

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0599

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #63127). Claimant filed a timely request for hearing. On April 1, 2014, ALJ Clink conducted a hearing, and on April 7, 2014 issued Hearing Decision 14-UI-14496, concluding the employer discharged claimant, but not for misconduct. On April 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Presbyterian Community Care Center employed claimant from April 5, 2005 to December 24, 2013 as a maintenance assistant.

(2) The employer's sexual harassment policy prohibited employees from making unwelcome sexual advances towards coworkers. Claimant understood the employer's policy.

(3) Claimant's work schedule was from 8:00 to 4:30, Tuesday to Saturday. On December 21, 2013, claimant reported to work at 8:00 a.m. There had been a snow storm the prior night, so claimant worked clearing the employer's parking lots until he went home for lunch at 11:00 a.m. Claimant was experiencing pain and discomfort from chronic pancreatitis. He did not return to work for the remainder of his shift because went to the hospital, where he was admitted and remained until Monday, December 23, 2013.

(4) On approximately December 22, 2013, a female employee complained to the employer, alleging that claimant had gone into the employer's laundry room to vacuum the dryer while she was working there

on the morning of December 21, 2013. She alleged that he walked by her and “rammed the vacuum into [her] butt” and said, “This is what I would like to do to you.” Transcript at 15. She alleged claimant had made sexual gestures and comments to her on two other occasions prior to December 21, 2013.

(5) On December 24, 2013, the employer discharged claimant for allegedly violating its sexual harassment policy.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he allegedly violated the employer's sexual harassment policy. Claimant's coworker accused him of making unwelcome sexual advances. The employer's human resources manager testified that it decided to believe the coworker's firsthand account of what occurred on December 21, 2013 rather than claimant's denial of the allegations because it believed claimant had been untruthful to the employer in the past. Transcript at 14. However, on this record, there is no basis to doubt claimant's credibility at hearing. The employer provided no firsthand testimony of the alleged incident in the laundry room on December 21, 2013, or the alleged prior incidents. Claimant refuted the employer's hearsay testimony with his own sworn, firsthand testimony that he did not enter the laundry room on December 21, 2013, and did not touch the coworker with the vacuum cleaner or make the sexual remark to her. Transcript at 22. Claimant's sworn testimony that he did not recall the prior incidents is also sufficient to rebut those allegations. Transcript 20-21. The employer's human resources manager asserted that claimant did enter the laundry room on December 21, 2013 because claimant left a telephone message for the employer's maintenance supervisor that day stating he was going to the laundry room. Transcript at 24. This, too, was hearsay refuted by claimant's testimony that he did not leave a message for the employer regarding the laundry room on December 21, 2013. Transcript at 28-29. The maintenance supervisor testified at hearing, but was unable to corroborate the human resources manager's testimony about the telephone message. *See* Transcript at 25-27. Because the employer failed to establish by a preponderance of the evidence that claimant engaged in the conduct alleged by the coworker, we cannot find that claimant engaged in misconduct.

Therefore, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 14-UI-14496 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D. E. Larson, not participating.

DATE of Service: May 12, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.